Case No. 73785

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellants,

vs.

THOMAS JESSUP, LLC SERIES VII; FOXFIELD COMMUNITY ASSOCIATION; AND ABSOLUTE COLLECTION SERVICES, LLC,

Respondents.

BRIEF OF AMICUS CURIAE RJRN HOLDINGS, LLC, IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus RJRN Holdings, LLC ("RJRN") certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

RJRN is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of RJRN Holdings, LLC's membership interest.

Amicus RJRN is represented by Michael Beede, Esq., and James Fox, Esq. of The Law Office of Mike Beede, PLLC.

DATED this 16th of May, 2018.

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INTEREST OF THE AMICUS CURIAE

RJRN Holdings, LLC ("RJRN") buys properties at association non-judicial foreclosure sales. Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

RJRN has a strong interest in the subject matter of this Court's Opinion because it addresses the legal effect when a bank asks for information, but ultimately fails to send payment to an Association. This issue is presented in multiple cases that RJRN still has pending before this court on appeal and in the lower state and federal courts.

DATED this 16th day of May, 2019.

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TABLE OF AUTHORITIES

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STATUTES

I. THE EQUITIES OF ALL AFFECTED PARTIES MUST BE WEIGHED.

In Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc., 366 P.3d 1105, 1114 (Nev. 2016), this court justly held that that "When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities." (internal citations omitted) However, RJRN respectfully submits that since the issuance of the *Shadow Wood* opinion, the equities of purchasers at foreclosure sales have rarely been given due weight. Citing to *Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)*, this Honorable Court elaborated that weighing the equities "includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." However, this Court's holding in the instant matter fails to consider the purchaser's status or actions in any meaningful way and condones direct harm to the only innocent party involved.

RJRN acknowledges that purchasers at real estate foreclosure sales are often viewed in an unfavorable light. However, purchasers at real estate auctions are a critical component of Nevada's real estate finance industry. Purchasers at real estate auctions infuse capital into the market and prevent creditors from taking title to property by way of credit bids. Purchasers at real estate auctions often bring properties into significant disrepair back into conformity with community standards

and help to preserve the stability of real estate values. The absence of purchasers at real estate auctions would ultimately bring about a decline in the auction sales prices, increasing the frequency and severity of deficiency judgments. However, if real estate purchasers such as RJRN are cannot rely on the recorded documents and the axiomatic principles of the bona fide purchaser doctrine and other equitable considerations, the incentive for purchasers to play their part in the industry will continue to decline.

This Court's holding in the instant matter is likely to have far-reaching implications which extend well-beyond NRS 116 foreclosures. Rather, the holding will undoubtedly be applied to foreclosure sales of all types, ranging from executions upon judgments to deed of trust foreclosures to property tax foreclosures. To ensure that the stability of these markets are maintained and that judgment creditors, deed of trust beneficiaries, and municipalities can each maximize their ability to recover debts by foreclosure, the Court must ensure that the purchasers are treated equitably under the law.

A. The Court Declined to Weigh the Equitable Factors Relevant to the Purchaser.

This Court's holding in the instant matter declines to weigh the equitable factors relating to a purchaser as compared to the other entities affected by the sale. In the instant matter, it appears to be undisputed that Absolute Collection Services

and Bank of America had an ongoing adversarial relationship with respect to the calculation and payment of NRS 116 superpriority liens. Whereas Bank of America and Absolute Collection Services each had competing views of their respective obligations, right, risks, and duties with respect to HOA foreclosures, these competing views were never publicly disclosed (or privately disclosed to this purchaser). Absent from the record is any indication that the Purchaser had any knowledge (whether actual, constructive, or inquiry) of the existence of these competing decisions. Rather, the purchaser at sale only had knowledge of the publicly recorded documents and rightfully relied on their accuracy and compliance with the law.

This Court has rendered dozens of opinions regarding HOA foreclosures since 2014, many of which identified presumptions on which Purchasers should be able to rely. It axiomatic that "Everyone is presumed to know the law, and this presumption is not even rebuttable."[1]

Foreclosure sales are presumed to have been conducted properly, absent an affirmative showing of some actual defect. See, e.g., *Fontenot v. Wells Fargo Bank,* 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011) ("[a] nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one

[1] *Smith v. State,* 38 Nev. 477, 481, 151 P. 512, 513 (1915)

attacking the sale must overcome this common law presumption 'by pleading and proving an improper procedure and the resulting prejudice.'"). As the Nevada Supreme Court explicitly clarified in *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, a lender seeking to divest a record owner of clear title "has the burden to show that the sale should be set aside." 2017 Nev. LEXIS 121 at *11 (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) The *Nationstar Mortgage* court also made clarified that a lender must disprove "the statutory presumptions that the HOA's foreclosure sale complied with NRS Chapter 116's provisions. *Id.* (citing NRS 47.250(16) (providing for a rebuttable presumption '[t]hat the law has been obeyed'); NRS 116.31166(1)-(2) (providing for a conclusive presumption that certain steps in the foreclosure process have been followed))."

Despite each of the foregoing presumptions upon which a purchaser should be able to reasonably rely, invariably, the risk of loss of all HOA foreclosure sales has been shifted to the Purchaser. Regardless of a purchaser's knowledge of any factor which would prevent it from taking clear title to property, where the Court has identified a latent defects in the sale process, the Court has declined to award lenders monetary damages from an HOA or collection agent for the lost financial interest the lender held in the property. Rather, the interest acquired by a purchaser at sale has uniformly been limited instead. The same result occurred here. Despite

the purchaser having zero knowledge of the pre-sale communications between ACS and Bank of America, and there being no evidence in the record that the Purchaser had the ability to discover the communications, the purchaser ultimately suffered the consequences of ACS communication to Bank of America. Both Bank of America and ACS had the knowledge, resources, and capacity to seek a judicial determination of their respective rights, yet neither acted. Nonetheless, the purchaser who bought the property subject to the presumptions outlined above (especially that the law was obeyed) has been denied fee-simple title and of its purchase price.

B. Inquiry Notice Cannot Extend Beyond What A Diligent Search Would Reveal

This Court in Shadow Wood defined a bona fide purchaser as one who "takes the property 'for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry.'" Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp. Inc., 366 P.3d 1105, 1115 (Nev. 2016) (quoting Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947)). It is critical that inquiry notice not be misconstrued as "notice of all facts in existence regardless if a diligent search would have revealed them." In the instant matter, and indeed, in most matters related to foreclosure sales, a purchaser's inquiry notice

cannot extend to those matters which are guarded by debt collectors like Bank of America and Absolute Collection Services. 15 U.S.C. § 1692c(b) (95 P.L. 109, 91 Stat. 874, "The Fair Debt Collections Practices Act," enacted in 1977) expressly prohibits creditors and debt collectors from disclosing any information regarding the existence, nature, amount, or other information regarding a debt. "Inquiry notice exists when the purchaser has notice of some fact that, in accordance with human experience, is sufficiently curious or suspicious that the purchaser should be obligated to make a further inquiry into it. (citation omitted). **No notice, however, should be imputed to a purchaser if a reasonable search would prove, or would have proven, futile."** Littlefield v. Bamberger, 32 P.3d 615, 619 (Colo. App. 2001).

This Court has confirmed that actions to quiet title are suits in equity, the equitable considerations of bona fide purchasers must be considered. If a purchaser does not know, and has no reason to know that a collection agent has an ongoing dispute with a lender that could jeopardize the interest it acquires at sale, the purchaser simply should not, as a matter of equity, bear the risk of loss. Rather, the risk of loss should be borne by the entity who acted wrongfully. Here, whether this Court ultimately finds that ACS is responsible for BANA's loss, or that BANA brought about its own loss, the innocent purchaser should be saddled with the effects of the wrongdoers actions.

CONCLUSION

This Court should grant Thomas Jessup, LLC's petition for en banc reconsideration and affirm the judgment in favor of Thomas Jessup, LLC.

DATED this 16th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief contains 2348 words.
3. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Respondent's Petition for En Banc Reconsideration** was made on May 16th, 2019 pursuant to the Master Service List.

Dated this May 16th, 2019.

/s/ Michael Beede
An employee of The Law Office of Mike Beede

Case No. 73785

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

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Respondents.

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May 16 2019 10:48 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

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RJRN is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of RJRN Holdings, LLC's membership interest.

Amicus RJRN is represented by Michael Beede, Esq., and James Fox, Esq. of The Law Office of Mike Beede, PLLC.

DATED this 16th day of May, 2018.

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT'S PETITION EN BANC RECONSIDERATION

Pursuant to NRAP 29(c), RJRN Holdings, LLC ("RJRN") respectfully requests leave to file an *amicus brief* in support of Thomas Jessup, LLC's Petition for Rehearing.

I. RJRN'S INTEREST[1]

RJRN buys properties at association non-judicial foreclosure sales. Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

RJRN has a strong interest in the subject matter of this Court's Opinion because it addresses the legal effect when a bank asks for information, but ultimately fails to send payment to an Association. This issue permeates multiple cases that RJRN still has pending before this court on appeal and in the lower state and federal courts.

II. THE REASONS WHY AN AMICUS BRIEF IS DESIRABLE.

Respondent's Petition focuses on the Court's misapplication of the standard of review to the specific facts in the case. In contrast, RJRN's proposed amicus brief presents arguments and law regarding the Court election not to weight the equitable

[1] NRAP 29(c)

interests of purchasers who are harmed by the undiscoverable conduct of HOA foreclosure agents and deed of trust beneficiaries.

CONCLUSION

Based on the foregoing, RJRN respectfully requests this Court grant it permission to file its amicus brief, a copy of which is being filed concurrently pursuant to NRAP 29(c) and this Court's instruction.

Respectfully submitted this 16th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of May, 2019. Electronic service of the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION** was made pursuant to the Master Service List.

Dated this 16th day of May, 2019.

/s/ Michael Beede
An employee of The Law Office of Mike Beede